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July 17, 2018

Exhibit 13

## Scott Ranch, LLC

Supreme Court of Montana

August 2, 2017, Submitted on Briefs; September 19, 2017, Decided

DA 17-0031

### Reporter

2017 MT 230 \*; 388 Mont. 509 \*\*; 402 P.3d 1207 \*\*\*; 2017 Mont. LEXIS 577 \*\*\*\*

SCOTT RANCH, LLC, a Montana Limited Liability  
Company, Appellant.

to address the petition's merits.

### Outcome

**Subsequent History:** Released for Publication October 5, 2017.

**Prior History:** [\*\*\*\*1] APPEAL FROM: Montana Water Court, Cause No. WC 2016-04. Honorable Russ McElyea, Presiding Judge.

The Court reversed the Water Court's order denying the LLC's petition for adjudication and remanded with instructions that the Water Court dismiss the petition without prejudice so that the LLC may timely file an exempt claim with the Department under the revised [Mont. Code Ann. § 85-2-222\(2\)](#).

[Scott Ranch, LLC, 2016 Mont. Water LEXIS 28 \(Nov. 1, 2016\)](#)

## LexisNexis® Headnotes

## Core Terms

water rights, exempt, reserved, Tribal, Tribe, rights, allotment, federally, deadline, allottees, appurtenant, adjudicate, state law

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

## Case Summary

Civil Procedure > Appeals > Standards of Review > De Novo Review

### Overview

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

ISSUE: Whether the Water Court ("WC") had jurisdiction to adjudicate appellant LLC's water rights claim. HOLDINGS: [1]-The LLC possessed Walton water rights as appurtenances to the lands it acquired; [2]-As claims for existing water rights recognized under state law, the LLC's claims were subject to the general statewide adjudication--and the July 1, 1996 filing deadline--unless exempted under [Mont. Code Ann. § 85-2-222](#); [3]-Nearly all of its 47 claims were for "livestock" or "individual uses" and were thus exempt from the filing requirements of [Mont. Code Ann. § 85-2-221\(1\)](#); [4]-The LLC's non-exempt claims were subject to the July 1, 1996 deadline for existing water rights. The WC was thus barred from hearing its post-July 1, 1996 petition as it was filed; [5]-It therefore lacked jurisdiction to adjudicate the LLC's claims, and erroneously proceeded

### [HN1](#) Standards of Review, Clearly Erroneous Review

The Supreme Court of Montana applies the same standards of review to decisions of the Water Court as it does to decisions of a district court. It reviews the Water Court's findings of fact to determine if they are clearly erroneous and its conclusions of law de novo to determine whether they are correct. It reviews a court's conclusion as to its jurisdiction de novo.

Governments > Native Americans > Water Rights



2017 MT 230, \*230; 388 Mont. 509, \*\*509; 402 P.3d 1207, \*\*\*1207; 2017 Mont. LEXIS 577, \*\*\*\*1

## [HN2](#) **Native Americans, Water Rights**

Under federal law, the creation of an Indian reservation impliedly reserves to the tribe water rights on that reservation necessary to fulfill the purposes of the reservation, with the priority date being the date of the reservation's creation. The Crow reservation was established by treaty in May 1868. The federally reserved water rights for the Crow Tribe thus have a priority date of May 1868--the date of the reservation's creation. The Tribe's federally reserved water rights were thus "existing" prior to July 1, 1973; refer to *Mont. Code Ann. § 85-2-102(12)*.

Governments > Native Americans > Water Rights

## [HN3](#) **Native Americans, Water Rights**

When a tribal member conveys allotment land to a non-member, the water rights appurtenant to the land transfer to the non-member. Upon conveyance of the land by an Indian the water right passes to the grantee as an appurtenance unless a contrary intention appears. Non-Indian successors to Indian allotment lands thus acquire "Walton" rights--a "right to share in reserved waters."

Governments > Native Americans > Water Rights

## [HN4](#) **Native Americans, Water Rights**

Under the terms of the Crow Compact itself, a "water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member" is a right "Recognized Under State Law." *Mont. Code Ann. § 85-20-901, Art. II.19.*

Real Property Law > Water Rights

## [HN5](#) **Real Property Law, Water Rights**

*Mont. Code Ann. § 85-2-222(1)* exempts pre-1973 water rights claims for "livestock and individual uses as opposed to municipal domestic uses based upon instream flow or ground water sources." Under recent amendments to the Act, a party claiming an exempt water right has until June 30, 2019, to file "a statement of claim for each water right asserted." 2017 Mont. Laws ch. 338, § 3. A party seeking adjudication of "exempt"

claims must follow specific procedures for filing the claims with the Department. 2017 Mont. Laws ch. 338, § 3. Failure to file a claim for an exempt right by the 2019 deadline "does not result in the forfeiture" of the existing right, but it "subordinates the existing right to all other water rights except those exempt rights for which a claim has not been filed." 2017 Mont. Laws ch. 338, § 3.

Civil Procedure > Preliminary  
Considerations > Jurisdiction > Subject Matter  
Jurisdiction

Real Property Law > Water Rights > Water Dispute  
Procedures

## [HN6](#) **Jurisdiction, Subject Matter Jurisdiction**

The Water Court has jurisdiction over matters relating to the determination of existing water rights within the boundaries of the state. *Mont. Code Ann. § 3-7-224(2)*. It may not, however, accept any statements of claim for non-exempt, existing rights submitted after July 1, 1996. *Mont. Code Ann. § 85-2-221(4)*.

Real Property Law > Water Rights

## [HN7](#) **Real Property Law, Water Rights**

The Legislature has allowed owners claiming existing, exempt water rights to file statements of claim until June 30, 2019. 2017 Mont. Laws ch. 338, § 3.

**Counsel:** For Appellant: Jordan W. Knudsen, Knudsen & Knudsen, PLLC, Hardin, Montana.

For Amicus Curiae: Nathan A. Espeland, Espeland Law Office, PLLC, Columbus, Montana, (Attorney for the Apsaalooke (Crow) Tribe); John L. Smeltzer, United States Department of Justice, Environment and Natural Resources Division, Appellate Section, Washington, DC (Attorney for the United States of America); Timothy C. Fox, Montana Attorney General, Jeremiah D. Weiner, Assistant Attorney General, Helena, Montana (Attorney for the State of Montana).

**Judges:** BETH BAKER. We Concur: MIKE McGRATH, JAMES JEREMIAH SHEA, DIRK M. SANDEFUR, JIM RICE. Justice Beth Baker delivered the Opinion of the Court.

**Opinion by:** BETH BAKER



## Opinion

[\*\*\*1208] [\*\*510] Justice Beth Baker delivered the Opinion of the Court.

[\*P1] Scott Ranch, LLC, acquired Indian allotment lands in 2010 and in 2012 that were previously held in trust by the United States for the benefit of Thor Lande, a member of the Apsaalooke (Crow) Tribe. Lande died in 1997, and the lands were converted to fee status in 2006. Scott Ranch petitioned the Water Court in 2016 for adjudication of existing water rights appurtenant to the [\*\*\*\*2] lands. The court denied Scott Ranch's petition. It held that the lands were part of the Tribal Water Right established by the Crow Water Rights Compact and did not require a separate adjudication. Scott Ranch appeals. We reverse.

[\*P2] We restate the dispositive issue as follows:

*Whether the Water Court had jurisdiction to adjudicate Scott Ranch's water rights claims.*

### [\*\*\*1209] PROCEDURAL AND FACTUAL BACKGROUND

[\*P3] Scott Ranch is a Montana limited liability company owned by three non-Indian siblings. It owns allotment lands located in Big Horn County, within water basin 43P and within the boundaries of the Crow Indian Reservation. The lands formerly were held in trust by the United States for the benefit of Thor Lande, an allottee of the Crow Reservation's federally reserved water right and a member of the Crow Tribe. Lande died in 1997. The United States issued fee patents and converted the lands to fee status in 2006. Scott Ranch purchased the lands from an heir of Lande in 2010 and in 2012.

[\*P4] Scott Ranch filed a petition for adjudication of existing water rights in July 2016. It asserted that all of its forty-seven claims were exempt from the claim filing requirements of [§§ 85-2-221](#) and [-222, MCA](#), because they were "for stock [\*\*\*\*3] or individual domestic use, based upon instream flow or groundwater sources." Scott Ranch asserted that its water rights were not available for state adjudication until 2006, when the fee patents were issued. It asked the Water Court to declare that it possessed "Walton" rights—private water rights held by a non-Indian successor to allotment lands that

are derived from the allottee's share of the federally reserved water right for the reservation—as appurtenances to the lands. It filed the petition "out of necessity" on the ground that the recent issuance of fee patents created "a unique set of facts" that prevented Scott Ranch or its predecessors-in-interest from seeking adjudication until this time. It noted also that the Water Rights Compact between the Crow Tribe, the State of Montana, and the United States (Crow Compact) did not address or adjudicate its water rights and that neither the April 2013 Crow Current Use List nor the January 2016 Preliminary Decree of Basin 43P contained its [\*\*511] rights.

[\*P5] Shortly after Scott Ranch filed its petition, the Water Master contacted Scott Ranch's counsel by telephone and recommended that counsel file the matter with the Department of Natural Resources [\*\*\*\*4] and Conservation (the Department) under the exempt claims filing procedures. Scott Ranch responded by filing a motion for a ruling on its petition for adjudication. It asked the Water Court to determine that its claimed water rights were federally reserved Walton rights that fell under the general adjudication of the Water Court. Scott Ranch asserted in this motion that its claims did not fall within the scope of [§ 85-2-222, MCA](#), as exempt claims because the rights were tied to Indian Trust land until 2006. In addition, Scott Ranch acknowledged that two of its claims would not be exempt under the statute. Therefore, Scott Ranch argued, the exempt claims filing procedures did not apply.

[\*P6] The Water Court held a hearing on Scott Ranch's petition in September 2016. The United States, the Crow Tribe, and the Montana Attorney General participated in the hearing but did not intervene in the proceeding or submit briefing.

[\*P7] In November 2016, the court denied Scott Ranch's petition. It held that Scott Ranch's water rights were part of the Tribal Water Right established on behalf of the Crow Tribe and its allottees under the Crow Compact. The court reasoned that Scott Ranch's water rights were appurtenant to [\*\*\*\*5] an allotment, that the allottee's water rights were part of the Tribal Water Right, and therefore that Scott Ranch had a right to share in the Tribal Water Right. The court concluded that Scott Ranch's water rights therefore did not require separate adjudication.

[\*P8] Scott Ranch moved to alter or amend the judgment under M. R. Civ. P. 59(e), and for relief from



final judgment or order under M. R. Civ. P. 60(b). It urged the court to hold that its *Walton* rights were not part of the Tribal Water Right and that they should instead be subject to the jurisdiction of the State of Montana.

[\*P9] The court denied Scott Ranch's motions in December 2016. It reasoned in part that Scott Ranch's claimed water rights did not come into existence until after the Legislature ratified the Crow Compact in 1999. The court explained that "the only water right remaining after the Compact was ratified was the Tribal Water Right." It stated that [\*\*\*1210] the tribal allottees had "no independent claim to a separate water right" apart from the Tribal Water Right, and therefore that the allottees could not have conveyed such a separate right to Scott Ranch.

## [\*\*512] STANDARDS OF REVIEW

[\*P10] [HN1](#) This Court applies the same standards of review to decisions of the Water Court as it does [\*\*\*\*6] to decisions of a district court. [In re Crow Water Compact, 2015 MT 217, ¶ 19, 380 Mont. 168, 354 P.3d 1217](#). We review the Water Court's findings of fact to determine if they are clearly erroneous and its conclusions of law de novo to determine whether they are correct. [In re Crow Water Compact, ¶ 19](#). We review a court's conclusion as to its jurisdiction de novo. [Interstate Explorations, LLC v. Morgen Farm & Ranch, Inc., 2016 MT 20, ¶ 6, 382 Mont. 136, 364 P.3d 1267](#).

## DISCUSSION

[\*P11] *Whether the Water Court had jurisdiction to adjudicate Scott Ranch's water rights claims.*

[\*P12] Scott Ranch argues that the Water Court erred in determining that its claims were part of the Tribal Water Right and therefore not governed by state law. It asks us to reverse the court's decisions and to instruct the court to declare that its water rights are recognized under state law. Amici United States, State of Montana, and Crow Tribe urge us to reverse the Water Court on the grounds that the court did not have jurisdiction to adjudicate Scott Ranch's claims and that the court erroneously held that Scott Ranch possessed an interest in the Tribal Water Right.

[\*P13] The Montana Legislature enacted the [Water](#)

[Use Act of 1973 \(the Act\)](#) in order to "provide for the administration, control, and regulation of water rights and establish a system of centralized records of all water rights," as mandated by [\*\*\*\*7] the Montana Constitution. [Section 85-2-101\(2\), MCA](#); 1973 Mont. Laws ch. 452, § 2; [Mont. Const. art. IX, § 3\(4\)](#). The Act required the Department to begin the process of determining "existing" water rights. 1973 Mont. Laws ch. 452, § 6. The Act defines an "existing water right" as "a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." [Section 85-2-102\(12\), MCA](#). For water rights based on appropriations after July 1, 1973, the Act provides for a mandatory permitting process administered by the Department. [Sections 85-2-301 to -381, MCA](#).

[\*P14] In 1979, the Legislature created a unified process for the general adjudication of existing water rights throughout the state. 1979 Mont. Laws ch. 697, §§ 1-38; [§ 85-2-701\(1\), MCA](#). The Legislature expressed its intent to include existing federal "reserved Indian water rights" as part of the general adjudication. 1979 Mont. Laws ch. 697, § 27; [§ 85-2-701\(1\), MCA](#). Under the terms of the Act, owners of existing [\*\*513] water rights were required to file claims with the Department by April 30, 1982, or abandon their claims to those rights. [Matter of the Adjudication of Water Rights in the Yellowstone River, 253 Mont. 167, 171, 832 P.2d 1210, 1212 \(1992\)](#) (citing [§§ 85-2-221 and -226, MCA](#)). The Legislature later extended that deadline to July 1, 1996. [Section 85-2-221\(3\), MCA](#). The Act provides that the "[D]epartment and the district courts may not accept any statements of claim" for existing water rights submitted after July 1, 1996. [Section 85-2-221\(4\), MCA](#).

[\*P15] The water [\*\*\*\*8] rights claimed by Scott Ranch are "existing" rights, as defined by [§ 85-2-102\(12\), MCA](#). [HN2](#) Under federal law, the creation of an Indian reservation impliedly reserves to the tribe water rights on that reservation necessary to fulfill the purposes of the reservation, with the priority date being the date of the reservation's creation. [Lewis v. Hanson, 124 Mont. 492, 496, 227 P.2d 70, 72 \(1951\)](#) (citing [Winters v. United States, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 \(1908\)](#)); [Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 \(9th Cir. 1981\)](#). The Crow reservation was established by treaty in May 1868. [United States v. Powers, 305 U.S. 527, 528, 59 S. Ct. 344, 345, 83 L. Ed. 330 \(1939\)](#). The federally reserved water rights for the Crow Tribe thus have a priority date of May 1868—the date of the reservation's creation. See [Lewis, 124 Mont. at 496, 227 P.2d at 72; Walton, 647 F.2d at 46](#).



The Tribe's federally reserved water [\*\*\*1211] rights were thus "existing" prior to July 1, 1973. *Section 85-2-102(12), MCA*.

[\*P16] **HN3** When a tribal member conveys allotment land to a non-member, the water rights appurtenant to the land transfer to the non-member. *Walton, 647 F.2d at 50; Lewis, 124 Mont. at 496, 227 P.2d at 72* ("Upon conveyance of the land by an Indian the water right passes to the grantee as an appurtenance unless a contrary intention appears."). Non-Indian successors to Indian allotment lands thus acquire "Walton" rights—a "right to share in reserved waters." *Walton, 647 F.2d at 50*. As the non-Indian successor-in-interest to allotment lands conveyed by a tribal member, Scott Ranch possesses *Walton* water rights as appurtenances to the lands it acquired. See *Lewis, 124 Mont. at 496, 227 P.2d at 72; Walton, 647 F.2d at 50*.

[\*P17] Scott Ranch's [\*\*\*\*9] *Walton* rights arose out of the transfer of land from a tribal allottee, not out of the Crow Compact. **HN4** Under the terms of the Crow Compact itself, a "water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member" is a right "Recognized Under State Law." *Section 85-20-901*, Art. II.19, MCA. Scott Ranch is a "nonmember" of the Crow Tribe, and the lands it acquired are "not held in trust by the United States." [\*\*514] *Section 85-20-901*, Art. II.19, MCA. Scott Ranch's claims are recognized under state law and are not part of the Tribal Water Right under the Crow Compact.<sup>1</sup> The Water Court erred in concluding otherwise.

[\*P18] As claims for existing water rights recognized under state law, Scott Ranch's claims were subject to the general statewide adjudication—and the July 1, 1996 filing deadline—"unless exempted under *85-2-222*." *Section 85-2-221(1), (4), MCA. HN5* *Section 85-2-222, MCA*, exempts pre-1973 water rights claims for "livestock and individual uses as opposed to municipal domestic uses based upon instream flow or ground water sources." *Section 85-2-222(1), MCA*.

<sup>1</sup> The Water Court relied in part on our holding in *In re Crow Water Compact* for its conclusion that Scott Ranch could not, as a successor of Indian allotment lands, claim water rights separate from the Tribal Water Right. The petitioners in that case were allottees and members of the Crow Tribe. *In re Crow Water Compact*, ¶ 10. Scott Ranch is not a member of the Crow Tribe. As such, our holding in *In re Crow Water Compact* is not on point.

Under recent amendments to the Act, a party claiming an exempt water right has until June 30, 2019, to file "a statement [\*\*\*\*10] of claim for each water right asserted." *2017 Mont. Laws ch. 338, § 3*. A party seeking adjudication of "exempt" claims must follow specific procedures for filing the claims with the Department. *2017 Mont. Laws ch. 338, § 3*. Failure to file a claim for an exempt right by the 2019 deadline "does not result in the forfeiture" of the existing right, but it "subordinates the existing right to all other water rights except those exempt rights for which a claim has not been filed." *2017 Mont. Laws ch. 338, § 3*.

[\*P19] Nearly all of Scott Ranch's forty-seven claims were for "livestock" or "individual uses" and were thus exempt from the filing requirements of *§ 85-2-221(1), MCA*. See *§ 85-2-222(1), MCA*. Scott Ranch asserted in its initial petition that all of its claims were exempt under *§ 85-2-222, MCA*. Yet in its subsequent motion for ruling on its petition for adjudication, Scott Ranch clarified that two of its claims were not exempt and argued that the exempt claims filing process provided by *§ 85-2-222, MCA*, did not apply to its claims. It asked the Water Court for a determination "that these claims are federally reserved claims that fall under the general adjudication of the Water Court, and not the exempt claim process." Scott Ranch acknowledges on appeal that it "did [\*\*\*\*11] not believe its water rights claims fell within the scope of *§ 85-2-222*." Scott Ranch thus did not "request a judicial determination" from the Water Court of its exempt rights and therefore did not file an exempt claim. *Section 85-2-222(2), MCA*.

[\*P20] **HN6** The Water Court has jurisdiction over "matters relating to the [\*\*515] determination of existing water rights within the boundaries of the state." *Section 3-7-224(2), MCA*. It may not, however, accept any statements of claim for non-exempt, existing rights submitted after July 1, 1996. *Section 85-2-221(4), MCA*. Scott Ranch petitioned the Water Court to [\*\*\*1212] declare that its existing claims fell under the general adjudication of the court. Scott Ranch disavowed that the exempt claims process applied, and did not follow the process prescribed by *§ 85-2-222, MCA*, for seeking judicial determination of exempt claims. Its non-exempt claims were subject to the July 1, 1996 deadline for existing water rights. See *§ 85-2-221(1), (3), MCA*. The Water Court was thus barred from hearing Scott Ranch's post-July 1, 1996 petition as it was filed. See *§ 85-2-221(4), MCA*. It therefore lacked jurisdiction to adjudicate Scott Ranch's claims, and it erroneously proceeded to address the merits of the petition.



2017 MT 230, \*230; 388 Mont. 509, \*\*515; 402 P.3d 1207, \*\*\*1212; 2017 Mont. LEXIS 577, \*\*\*\*11

**[\*P21]** Although the Water Court lacked jurisdiction over Scott Ranch's petition as filed, [HNT](#) the Legislature **[\*\*\*\*12]** has allowed owners claiming existing, exempt water rights—such as Scott Ranch—to file statements of claim until June 30, 2019. [2017 Mont. Laws ch. 338, § 3](#). Insofar as Scott Ranch's exempt claims are concerned, it should follow the procedures set forth by the 2017 Legislature for submitting its claim to the Department for examination prior to the deadline.

**[\*P22]** The circumstances surrounding Scott Ranch's water rights claims present a somewhat unusual situation. The allotment lands that it acquired had been held in trust by the United States until 2006, when they were converted to fee status. At the time of the July 1, 1996 claims filing deadline, Scott Ranch's claimed water rights had not yet been conveyed out of trust and were still part of the federally reserved Indian water right. Neither Scott Ranch nor its predecessors-in-interest could have timely filed claims for existing rights by the general adjudication deadline.

**[\*P23]** It is possible that other owners in circumstances similar to Scott Ranch's face this same predicament. Apart from the recently enacted provisions for filing exempt water rights claims prior to June 30, 2019, no mechanism exists for a party in Scott Ranch's position that **[\*\*\*\*13]** has not already filed a statement of claim to include its existing *Walton* claims in the general statewide adjudication process. See [2017 Mont. Laws ch. 338, § 3](#). We emphasize that Scott Ranch and owners in similar circumstances should file their exempt claims by the June 30, 2019 deadline in order to avoid having their rights subordinated "to all other water rights except those exempt rights for which a claim has not been **[\*\*516]** filed." [2017 Mont. Laws ch. 338, § 3](#).<sup>2</sup>

## CONCLUSION

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<sup>2</sup> We note Scott Ranch's indication that two of its forty-seven claims are non-exempt claims and that Scott Ranch will not be able to file these claims under the exempt claims filing process. Because these claims were still part of the federally reserved Indian water right at the time of the July 1, 1996 filing deadline, Scott Ranch and the amici represent that its predecessors could not have filed the claims before that date. This suggests a possible jurisdictional gap that is not developed in the briefing here and may warrant the Legislature's examination: the adjudication process for non-exempt *Walton* claims that were not separated from a federally reserved Indian water right until after July 1, 1996.

**[\*P24]** We reverse the Water Court's order denying Scott Ranch's petition for adjudication and remand with instructions that it dismiss the petition without prejudice so that Scott Ranch may timely file an exempt claim with the Department under the revised [§ 85-2-222\(2\), MCA](#).

/s/ BETH BAKER

We Concur:

/s/ MIKE McGRATH

/s/ JAMES JEREMIAH SHEA

/s/ DIRK M. SANDEFUR

/s/ JIM RICE

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Neutral

As of: June 28, 2018 8:50 PM Z

## Scott Ranch, LLC

the Water Court of the State of Montana

December 19, 2016, Decided; December 19, 2016, Filed

CASE NO. WC-2016-04

### Reporter

2016 Mont. Water LEXIS 29 \*

PETITION OF SCOTT RANCH, LLC FOR  
ADJUDICATION OF WATER RIGHTS IN BASIN 43P

**Prior History:** [Scott Ranch, LLC, 2016 Mont. Water LEXIS 28 \(Nov. 1, 2016\)](#)

### Core Terms

water rights, rights, Tribal, allottees, ratified, prior order, asserts, held in trust, state law, equal shares, ratification, appurtenant, transferred, allotment, cases

**Judges:** [\*1] Russ McElyea, Chief Water Judge.

**Opinion by:** Russ McElyea

### Opinion

#### **ORDER DENYING MOTION UNDER RULES 59(E) AND 60(B), M. R. CIV. P.**

##### **I. PROCEDURAL HISTORY**

Scott Ranch, LLC (hereafter "Scott" or "Scott Ranch") has filed a motion pursuant to Rules 59(e) and 60(b), M. R. Civ. P. asking this Court to amend or set aside a prior order dated November 1, 2016. The November 1, 2016 Order Denying Petition was issued in response to a request by Scott Ranch to separately adjudicate water rights previously appurtenant to allotment lands.

Scott acquired the allotment lands in 2006, after the Crow Compact was ratified by the Montana Legislature, and after the deadlines for filing water right claims in Montana's statewide adjudication.

This Court denied Scott's request for a separate adjudication of its water rights. The basis of that ruling was that Scott's rights originated with an allottee, and that the allottee's rights were part of the Tribal Water

Right. This Court wrote:

Both the Compact and the Settlement Act address the rights of allottees. The Compact defines the Tribal Water Right as "the right of the Crow Tribe, including any Tribal member, to divert use or store water" described in the Compact. Compact, art. II, § 30 (emphasis added). The Compact further states that the water rights [\*2] "confirmed to the Tribe in this Compact are in full and final satisfaction of the water right claims of the Tribe and the United States on behalf of the Tribe and its members, including federal reserved water rights claims based on *Winters v. United States*... ." Compact, art. VII, § C.

The Settlement Act states that "any entitlement to water of an allottee under Federal law shall be satisfied from the tribal water rights." Act, § 407(d)(2).

Order Denying Petition for Adjudication, 4-5, November 1, 2016.

Scott's request for reconsideration of this Court's November 1, 2016 Order raises two issues. First, Scott asserts that the November 1, 2016 order reverses prior orders of this Court stating that *Walton* rights are not part of the Tribal Water Right. Second, Scott contends the effect of the November 1, 2016 Order is to place its rights under the jurisdiction of the Tribe. Scott asserts that this shift in jurisdiction conflicts with the Compact, which disallows the Crow Tribe's authority to control water rights appurtenant to fee lands owned by non-Tribal members.

##### **II. ISSUES**

1. Does this Court's November 1, 2016 order amount to a reversal of prior orders in other cases?

2. Does this Court's November 1, [\*3] 2016 order improperly grant the Tribe jurisdiction over Scott's rights?



### III. PRINCIPLES OF LAW

The Crow Compact defines the Tribal Water Right as "the right of the Crow Tribe, including any Tribal member, to divert, use, or store water as described... in this Compact." Compact, art. 11.30. The Tribal Water Right "shall be held in trust by the United States for the use and benefit of the Tribe and the allottees..." *Water Rights Settlement Act of 2010 (Claims Resettlement Act of 2010)*, Pub. L. No. 111-291, 124 Stat. 3064, § 407(c)(1).

A group known as the Crow Allottees objected to the Crow Compact when it was issued as a Preliminary Decree by the Water Court. The Crow Allottees asserted that they had reserved water rights appurtenant to their allotments and claimed those rights should be adjudicated separately from the *Winters* rights held by the Tribe.

The Montana Supreme Court rejected this argument, noting that the United States, acting as trustee, waived whatever claims the Crow Allottees had in exchange for the Allottees' right to use a just and equal share of the Tribal Water Right identified in the Compact. *In re Crow Water Compact*, 2015 MT 217, ¶ 15, 380 Mont. 168, 354 P.3d 1217 (hereafter *Crow Allottees* case).

### IV. ANALYSIS

1. Does this Court's November 1, 2016 [\*4] Order amount to a reversal of prior orders in other cases?

Scott asserts that this Court's November 1, 2016 Order effectively reverses two prior orders in cases 430-8 and 43N-4.

Like the present case, 430-8 involved *Walton* rights. Unlike the present case, the *Walton* rights in case 430-8 were transferred from Tribal member allottees to non-Indian ownership many years prior to the April 30, 1982 filing deadline applicable to water rights in Montana's statewide adjudication.<sup>1</sup> As a consequence, the claimants in that case filed claims under state law for their *Walton* rights years before the Crow Compact was approved.

Like all *Walton* rights, the claims in case 430-8 were

<sup>1</sup> Five of the claims in case 430-8 were transferred from Buffalo That Grunts to James C. Foster on February 25, 1921. One claim was transferred from Flower Whiteshirt to Melvin C. Neal on December 3, 1954, and the last claim was transferred out of trust status and into the ownership of Claren Neal on May 1, 1973.

originally *Winters* rights owned by the Tribe. Those rights became *Walton* rights upon transfer from their allottee owners to non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). Unlike the claims in the present case, the claims in case 430-8 were not owned by the Tribe or a Tribal member at the time the Compact was ratified by the Legislature on June 22, 1999. The owners of the water rights in case 430-8 were not part of the Compact negotiations, and the rights they held were not waived in exchange for the Tribal Water Right identified in the Compact. The same analysis [\*5] applies to the water right in case 43N-4.<sup>2</sup>

Scott has asserted its rights "were water uses tied to Indian Trust Land until 2006, when the lands were converted to fee status." Motion for Ruling on Petition for Adjudication, 2, August 1, 2016. According to Scott, any water rights appurtenant thereto were held in trust at the time the Compact was ratified by the Legislature. If that is correct, those rights were waived and exchanged for a just and equal share of the Tribal Water Right. "The Crow Tribe on behalf of itself and its members, and the United States as trustee for the Allottees, waived and released all other claims to water in exchange for those recognized in the Compact." *Crow Allottees*, ¶ 6.

Scott is therefore in a different position than the owners of *Walton* rights who acquired land from allottees before the Compact was ratified. Unlike the claimants in cases 430-8 and 43N-4, Scott's rights were not acquired until after the Compact was ratified. Under the holding in the *Crow Allottees* case, the language of the Compact, and the Settlement Act, the only water right remaining after the Compact was ratified was the Tribal Water Right. The *Crow Allottees* case states that individual [\*6] allottees could not claim water rights separate from the Tribal Water Right.

It is a fundamental principle of property law that a grantee receives the rights of a grantor. This rule applies to grants of land from allottees to non-Indians. When "title passed from an Indian to a non-Indian for an allotted [sic] parcel, the appurtenant right to share in tribal reserved waters passed with it." *United States v. Anderson*, 736 F.2d 1358, 1362 (9th Cir. 1984) (citing *Walton*, 647 F.2d at 50). The rationale behind recognition of *Walton* rights was that "for an Indian allottee to enjoy the full benefit of his allotment, he must be able to sell his land together with the right to share in

<sup>2</sup> The claim in case 43N-4 was transferred from trust to fee ownership on January 5, 1955.



the reserved waters." Anderson, 736 F.2d at 1362 (citing Walton, 647 F.2d at 49-50).

After the Compact was ratified by the Legislature, allottees had a right to a just and equal share of the Tribal Water Right, but no independent claim to a separate water right that could have been conveyed to Scott. Scott could only receive what the allottee had the ability to convey. At most, an allottee could convey an entitlement to a just and equal share of the Tribal Water Right, but not a separate water right.

Because *Walton* rights acquired before the ratification of the Compact are not part of the Tribal Water Right, nothing in this Court's November 1, 2016 [\*7] Order invalidates the rulings in 430-8 or 43N-4.<sup>3</sup>

Scott may argue that its rights still require separate adjudication because they were acquired before the Effective Date of the Compact. The Effective Date of the Compact is the "the date on which the Compact is ratified by the Crow Tribal Council, by the Montana legislature, and by the Congress of the United States, whichever date is latest." Crow Compact, art. 11.12. The Crow Tribal Council voted to seek legislative approval of the Compact in 1999, and the Montana Legislature approved the Compact in June of that year. The United States Congress did not approve the Compact until 2010.

Despite the Compact's reference to an Effective Date, the Compact, and the water rights of the Tribe and allottees, were ratified by the Montana Legislature on June 22, 1999, and have not changed since. Ratification by the Legislature established which water rights were included in the Tribal Water Right and served as an important benchmark for several other purposes. Ratification is referenced 70 times throughout the Compact, and provides a baseline for quantifying the Tribe's current uses, protecting rights Recognized Under State Law (state [\*8] based rights), and determining when a basin is to be considered closed to new appropriation. Most importantly for the purposes of this case, the calculation of what rights were included in the Tribal Water Right was based on lands held in trust on

behalf of the Tribe and allottees as of June 22, 1999.

For these reasons, the date of ratification by the Montana Legislature should be used in this case to establish the demarcation between pre-Compact water rights and the post-Compact Tribal Water Right. This demarcation is appropriate because the rights described in the Compact did not change during the eleven-year gap between ratification of the Compact by the Montana Legislature and the Compact's eventual adoption by the United States Congress. Once the Compact became part of state law, the water rights it recognized became fixed. Under the Crow Allottee case, the rights of Scott's allottee predecessor were part of the Tribal Water Right recognized in the Compact. The existence of an Effective Date did not change the allottee's rights to a just and equal share of the Tribal Water Right.

Adjudication of the water rights in the Compact effectively occurred when the Water Court approved the [\*9] Compact. The petitioner now requests that the rights it acquired be carved out of the Tribal Water Right and adjudicated separately. The same request was rejected in the Crow Allottees case, which held that the rights of allottees could not be segregated from the Tribal Water Right.

2. Does this Court's November 1, 2016 Order improperly grant the Tribe jurisdiction over Scott's rights?

Scott asserts that if the rights it acquired were part of the Tribal Water Right, then "this Court has ordered that water rights owned by non-tribal members on fee land are under the control of the Crow Tribe." Scott Motion to Alter or Amend Judgment, 4, November 23, 2016. Scott further asserts that "the result would be that Petitioner's water rights would then be held in trust by the United States." *Id.* Scott contends that if this Court's prior order stands, "all water abstracts issued in the 43P decree with *Walton* right designations would no longer be under the administration of the State of Montana..." Scott Motion to Alter or Amend Judgment, 5, November 23, 2016.

Scott asserts these problems exist because its rights fit the Compact's definition of a right Recognized Under State Law. A right Recognized [\*10] Under State Law includes "a water right held by a nonmember of the Tribe on land not held in trust by the United States for the Tribe or a Tribal member." Compact, art. 11.19. Such rights are administered and enforced by the State of Montana. Compact, art. IV.A.3.a. The Tribe may not administer any water right Recognized Under State

<sup>3</sup> *Walton* rights that predate the Compact are not included in the Compact and are not deducted from the amount of water allocated to the Tribe by the Compact. In contrast, a *Walton* right created by a conveyance from an allottee after the Compact is part of the Tribal Water Right as that term is defined in the Compact and must be deducted from the water allocated to the Tribe.



Law, and the State of Montana may not administer any Tribal Water Right. Compact, art. IV.A.2.c. and art. IV.A.3.b.

Russ McElyea

Chief Water Judge

No other party is asserting that Scott's rights are under the control of the Crow Tribe, that they are held in trust by the United States, or that they can no longer be administered by the State of Montana. Accordingly, there is no case in controversy, and no issue for this Court to resolve.

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The Montana Supreme Court has consistently held that it will not render advisory opinions. Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, ¶ 9, 355 Mont. 142, 226 P.3d 567. "The judicial power of Montana's courts is limited to justiciable controversies," Chipman v. Nw. Healthcare Corp., 2012 MT 242, ¶ 19, 366 Mont. 450, 288 P.3d 193. To fall within a court's adjudicatory power, a controversy must be 'real and substantial..., admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract [\*11] proposition." Plan Helena, ¶ 9 (quoting Chovanak v. Matthews, 120 Mont. 520, 526, 188 P.2d 582, 585 (1948)).

While the concerns raised by Scott may arise in the future, they are not presently before the Court, and a ruling on those issues would amount to an advisory opinion.

#### V. CONCLUSIONS OF LAW

1. This Court's November 1, 2016 Order does not reverse prior orders in other cases.

2. This Court's November 1, 2016 Order does not address the issue of Tribal jurisdiction over Scott's rights. That issue has not been properly raised by adverse parties and this Court declines to issue an advisory opinion on that question.

Scott has not made the showing required under either Rule 59(e) or 60(b) of the Montana Rules of Civil Procedure.

#### VI. ORDER

Scott's request pursuant to Rules 59(e) and 60(b), M. R. Civ. P. is DENIED.

DATED this 19 day of December, 2016.

/s/ Russ McElyea